In The
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-918

MICHAEL PAPADOPOULOS Ph.D.,
Petitioner,

vs.

OREGON STATE UNIVERSITY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner entered his complaint in the District Court against OREGON STATE UNIVERSITY; OREGON STATE BOARD OF HIGHER EDUCATION; RAY T. YASUI, JANE CARPENTER, GEORGE H. COREY, ROBERT D. HOLMES, ELIZABETH H. JOHNSON, PHILIP A. JOSS, GEORGE H. LAYMAN, VALERIE McINTYRE, W. PHILIP McLAURIN, MARC F. MADEN, JOHN D. MOSSER, ANCIL H. PAYNE, LOUIS B. PERRY, JOHN W. SNIDER, LORAN L. STEWART and E. G. WESTERDAHL II, *in their individual capacities and in their capacities as members or as ex-members of the Oregon State Board of Higher Education;* ROY E. LIEUALLEN, *in his individual capacity and*

in his official capacity as Chancellor of the Oregon State Board of Higher Education; ROBERT W. MACVICAR *in his individual capacity and in his official capacity as President of Oregon State University;* ROY A. YOUNG & JAMES H. JENSEN *in their individual capacities and in their official capacities as ex-presidents of Oregon St State University;* and DAVID B. NICODEMUS *in his individual capacity and in his official capacity as Dean of Faculty of Oregon State University,* the respondents herein.

Petitioner Michael Papadopoulos Ph.D., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on August 18, 1977.

OPINIONS BELOW

The District Court entered an unreported opinion which is set out in Appendix C, *infra*, p. 31. The Court of Appeals for the Ninth Circuit entered an unreported opinion which is set out in Appendix A, *infra*, p. 28.

JURISDICTION

The date of the judgement sought to be reviewed is August 18, 1977, and the date of entry is August 18, 1977. *Appendix A, infra,* p. 28. An order denying rehearing was entered on September 29, 1977. *Appendix B, infra,* p. 30. The statutory provision believed to confer on this Court jurisdic-

tion to review the judgment in question is 28 USC §1254, 62 Stat. 928.

QUESTIONS PRESENTED

1. Whether the court of appeals is authorised by any federal statutory or constitutional principle to affirm the departure from the requirement that the district court give the records and proceedings of Oregon courts the same full faith and credit as they have by law or usage in the courts of Oregon, this being a case in which the district court failed or refused to apply Oregon's law of *res judicata* to records and proceedings of Oregon courts.

2. Whether the court of appeals is authorised by any federal statutory or constitutional principle to affirm failure or refusal of the district court to try an issue, one identical to the issue placed for determination before the state court in a pending proceeding on remand, this being a case where where petitioner alleged before the district court that the state court lacked jurisdiction to determine that, and other issues.

3. Whether the court of appeals is authorised by any federal statutory or constitutional principle to affirm failure or refusal of the district court to try the issue, placed before it, of the limits to the jurisdiction enjoyed concurrently by the state court in a pending proceeding on remand.

4. Whether the court of appeals is authorised by any federal statutory or constitutional principle to affirm the district court's decision barring from litigation on res judicata - collateral estoppel grounds alone petitioner's causes of action which had not accrued at the time of any prior litigation in the pending state proceeding.

5. Whether the court of appeals is authorised by any federal statutory or constitutional principle to affirm failure or refusal by the district court to exercise jurisdiction over causes, state or federal, which neither were relevant to the pending state proceeding involving petitioner and only one of the respondents, nor were authorised under state law to be joined in that proceeding.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of federal statute involved in the case are:

1. 62 Stat. 947, 28 USC §1738, which in pertinent part states:

> "(The) * * * records and judicial proceedings (of any court of any * * * State) * * * shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * * from which they are taken."

2. 72 Stat. 415, 28 USC §1331, which in pertinent part states:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, * * *, and arises under the Constitution, laws, or treaties of the United States."

3. 78 Stat.445, 28 USC §1332, which in pertinent part states:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, * * *, and is between --
>
> * * *
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; * * *."

and,

4. 71 Stat. 637, 28 USC §1343, which in pertinent part states:

> " The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done

> in furtherance of any conspiracy mentioned in section 1985 of Title 42;
>
> (2) To recover damages from any person who fails to prevent or aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
>
> (3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress provided for the protection of civil rights, * * *."

The provisions of the Constitution of the United States involved in this case are:

> " Article III
>
> " Section 1. The judicial power of the United States, shall be vested in one supreme Court. and in such inferior Courts as the Congress may from time to time ordain and establish. * * *.

" Section 2. The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, (and) the Laws of the United States, * * *; - to controversies * * * between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

and:

" Amendment V
" * * *; nor shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *."

The provisions of Oregon statutes involved in the case are appended, *see Appendix G, infra*, p.92.

STATEMENT OF THE CASE

The court of appeals affirmed the judgment of the district court. That judgment was entered in a case involving multiple claims against multiple parties.(R.67-90) That judgment was in favor of all the respondents, and it was based on the grant of summary judgment in favor of all the respondents and against the petitioner. Summary judgment was granted solely on the ground that res judicata - collateral estoppel is applicable. (R.193)

Petitioner admitted, by his pleading, having been involved in prior litigation, he entered his affidavit to state that the prior litigation had been remanded for further proceedings in the state court, and that no proceedings had taken place on remand. (R. 168) He alleged by his pleading that the matters and causes placed before the district court were and are beyond the jurisdiction of the state court except as to certain issues specified in the pleading (R. 74,79)

Petitoner invoked the district court's jurisdiction on the ground of diversity of citizenship and amount in controversy; his complaint shows that he is a citizen of a foreign State, and that all the respondents are citizens of States and of the United States. He also invoked the district court's jurisdiction because action was authorized under provision of the United States Constitution as well as under various provisions of the Civil Rights Act of 1871. He also alleged that the matter in controversy exceeds the sum of $10,000, exclusive of interest and costs. (R.68)

Backround to prior litigation

Petitioner Michael Papadopoulos is a professor of mathematics. In 1966 the chairman of the mathematics department of Oregon State University acted for that university and for the Oregon State Board of Higher Education to make petitioner an offer of position. Petitioner negotiated the terms, conditions and the purpose of his proposed service as full professor; he reached agreement with the chairman on the terms and conditions including those creating job security for which petitioner provided separate consideration. Petitioner was expected under that agreement to involve himself in a long term task for which he was exceptionally well-qualified, and he had negotiated and reached agreement for a *de facto* tenure status as being proper in the circumstances. Petitioner arrived in Oregon in June of 1967 and he was immediately placed on the payroll as had been agreed (R.81)

Petitioner performed diligently and well all the things he was brought to do. He involved himself, additionally and without detriment to his professional service, in various public activities as a pacifist, a member of the anti-war movement and in activities promoting civil liberties and in opposition to racial inequality. (R.73-74)

After serving for three years, petitoner was prevented from doing the things he had negotiated and agreed to do; he was taken off the payroll.

He had been evaluated favorably by the department during those years both

for the award of merit raises in salary, and for the award of formal recognition by the Board of Higher Education of *indefinite tenure* status.

Although required under rules and regulations to be sent up the chain-of-command for action, those departmental evaluations were not sent on; they were prevented from doing so by the Dean of the School of Science. (R.77-78) Petitioner received no salary increase during his three years of service by reason of the Dean's acts; in place of the report favoring award of recognition of his *indefinite tenure* status, the Dean sent up the chain-of-command a recommendation that petitioner's appointment be terminated. The dean had, by misrepresentations, procured support for his recommendation; on the strength of such misrepresentations, which remained secret,the university president made the official university decision to separate petitioner from his position as full professor in June of 1970, in breach of the agreement which petitioner had negotiated and made with the department chairman. (R.79)

The Dean had acted on previous occasions to petitioner's injury. He had made highly defamatory remarks about the petitioner to the chairman of the mathematics department in an attempt to get that chairman to repudiate the agreement that had been reached regarding petitioner's service as full professor. (R.75) He had also acted to tell petitioner that his public activities were of official concern to the university and that his future activities would be kept

under continuous scrutiny by the office of the Dean. (R.76)

Once the official decision to terminate petitioner's services had been made, the reasons stated for that decision, namely that it was the Dean's judgment that petitioner's professional record failed to demonstrate the degree of scholarly performance expected of a full professor, were spread on the public record and were published in the staff newsletter and elsewhere. (R.82)

At the same time, there had been an official investigation of the conduct by the Dean of his office. The report, which described improper official conduct by the Dean with regard to the absence of standards for evaluating professors, and with regard to other matters, was not made public, and was only treated as a public record long afterwards as the result of a mandamus proceeding brought by petitioner.(R.84)

Petitioner appealed to the Board of Higher Education to evaluate and reverse the official university decision under a provision of regulations permitting such appeal of disagreements between the president and staff members at the university (R.163) He was heard before a committee of the Board without opportunity to examine witnesses; that committee restricted to procedural matters the issues it would hear. The committee ruled adversely as to the procedural matters it allowed petitioner to raise, and its decision was adopted by the Board.

Petitioner, at that time still employed by the university, filed a petition for judicial review of administrative decision pursuant to ORS 183.480 (*see Appendix G*) (R.165). Petitioner alleged facts sufficient to provide authority for the Circuit Court of Marion County to compel the Board to act upon a finding of unlawful refusal to act or of unreasonable delay of action, and he invoked ORS 183.490 (*see Appendix G*) for that purpose.

Petitioner had been taken off the payroll by the time the Circuit Court ordered the Board to give petitioner a hearing on the reasons for his termination.
He was given a hearing; no issues were, however,set for determination (R.166)
The Board adopted Findings of Fact not consisting of a concise statement of the determination of each contested issue (*See ORS 183.470:Appendix G*); it approved the official decision which had already been put into effect by the university.(R.166)

The Circuit Court affirmed the Board's decision summarily, and petitioner appealed to the Oregon Court of Appeals.

The opinion of the Oregon Court of Appeals

The Court of Appeals issued its opinion appended hereto. *See Appendix E*, p. 39.
It ruled that the dispositive issue was whether petitioner was entitled to a hearing before being discharged effective June 1970. *Papadopoulos v. Bd.of Higher Ed.* 14 OrApp 130,135, 511 P2d 854 (1973) By that ruling the Court of Appeals avoided a decision as to the adequacy or validity of the

post-discharge hearing which had been held without petitioner having been given notice of the issues set for determination. The Court of Appeals pointed out that determination of petitioner's right to a *contested case* hearing (*See Appendix G: ORS 183.310*) required analysis of constitutional authorities. *Papadopoulos,supra,* 14 OrApp 130 at 156. It concluded that petitioner's right to a *contested case* stemmed from the US Constitution's 14th Amendment. It interpreted this Court's recent decisions in *Board of Regents v. Roth,* 408 US 564 (1972) and *Perry v. Sindermann,* 408 US 593 (1972) as requiring public employe tenure rights arising solely from statutes or from regulations adopted pursuant to a statutory grant of authority to be protected by the 14th Amendment's Due Process Clause. It stated:

> " * * *. It is these tenure rights based on statute or regulation that create property interests that cannot be withdrawn without a due process hearing. Employment contracts of public employes may create rights to continued employment over and above that provided by statute or regulation. But such an employment contract, standing alone, does not create the kind of interest that triggers the requirement of a due process hearing before the government withdraws the benefits of the contract, i.e., breaches it. In such a situation,the public employe's remedies are measured by the law of contracts, not by constitutional law. " *Papadopoulos,supra,* 14 OrApp 130 at 169.

The Court of Appeals ruled that petitioner's right to a *contested case* hearing derived solely from the fact that he had been given insufficient notice of termination under the Board's regulations, and that those regulations created a right to one more year of employment, in the circumstances, a right which could not be breached without the hearing required by the 14th Amendment; such hearing was required by the Oregon Administrative Procedures Act to be conducted in accordance with the provisions of that Act. *Papadopoulos , supra,* 14 Or App 130 at 176-177.

The Court of Appeals ruled, finally, that petitioner's June,1970, discharge was in violation of his right under the US Constitution to a hearing before being deprived of a property interest in continued employment until June 1971, and in violation of his statutory right to a *contested case* hearing conducted in accordance with the provisions of the Oregon Administrative Procedures Act. *Papadopoulos, supra,* 14 OrApp 130 at 177.

The Court of Appeals declared that the issue of remedy had not been briefed, and remanded the matter to the circuit court for exploration and the hearing of evidence on the remedy issue. *Papadopoulos, supra,* 14 OrApp 130 at 178.

To the extent that the circuit court had affirmed petitioner's discharge effective June 1970, that determination was reversed and remanded for further proceedings on petitioner's damages. In all other respects the circuit court's decision was affirmed. *Papadopoulos,supra,* 14 OrApp 130 at 179.

The proceeding on remand is pending.(R.168)

The district court proceeding

By his complaint filed in the district court petitioner placed in issue multiple claims. He placed in issue the question of the jurisdiction of the state courts to have decided,at any prior stage of the pending proceeding, issues not required to have been decided in the determination of his right to a *contested case* hearing prior to discharge from employment. He also placed in issue his claim to an employment contract based on negotiation and agreement reached with an authorised agent of the Board of Higher Education and of Oregon State University, on consideration given and received, and on ratification, such a contract being alleged to be a contract for continuing employment breached partially with each annual failure of the university to recommend and of the Board to effect the placing of petitioner on the payroll for the subsequent year in the m manner specified by regulations.

He joined in his allegations claims that various parties had joined in a conspiracy by which he had been injured, and by which he alleged that he had been damaged in his Civil Rights; he claimed the conspiracy to be continuing, an possibly multiple, he enumerated a series of overt acts in furtherance of the conspiracies alleged, each act mentioned being itself tortious, and he claimed of some of those torious acts that they were of a kind capable of causing petitioner further and future damage.(R.67-90)

He served his summons and his complaint on multiple parties, both individually and in their past or present capacities as members, agents or employes of the Board of Higher Education or of Oregon State University.(R.67-73)

The respondents answered by their motion to dismiss or for summary judgment.(R.50-53). They filed no affidavits or other authenticated material in support of their summary judgment motion. They entered exhibits on their face extracted from the record of prior court proceedings between petitioner and one of the respondents; petitioner admitted to the authenticity of a judgment entered in Marion County Circuit Court on February 15, 1972, of the petition on which that judgment was issued, and of the Oregon Court of Appeals opinion published as *Papadopoulos v. Bd.of Higher Education*,14 OrApp 130, 511 P2d 854 (1973).

By their memorandum, the respondents indicated that their summary judgment claim rested on:

(1) The statute of limitations applicable in Oregon to civil rights claims;(R.56)

(2) The doctrines of *res judicata* and of election of remedies;(R.59)

(3) The immunity from suit of certain respondents;

and on nothing else.

The district court found that the petitioner was reasserting issues "already determined or issues (which should have been) raised in (petitioner's) prior

administrative or judicial hearings". (R.192) The district court did not decide the other issues raised. *Id. See Appendix C, infra,* p. 31.

REASONS FOR GRANT OF WRIT

A. The Congress, having created the district courts under the authority of Article III of the United States Constitution, *supra* p.6, has ordained that the district courts give full faith and credit to records and proceedings of the courts of any State. 28 USC §1738, *supra* p.4. The court of appeals below has recognised this principle to be one requiring the district courts to apply to the record and proceedings of a State court the preclusive effect ordained, under the *res judicata* rule, by the law and usage of the courts of that State. *Neale v. Goldberg*, 525 F2d 332 (CA 9, 1975), *also* 1B *J.Moore: Federal Practice*, ¶0.406(1) and at p.901 n.2. The district court failed or refused to apply this principle in this case.

It appeared on the face of the district court record that one, and only one, of the respondents was party to a State proceeding brought by the petitioner in the circuit court of Marion County, Oregon. It appeared, further, that there had been entered a judgment, and that upon appeal that judgment had been affirmed in part, and in part reversed and remanded for further proceedings

limited to exploration and the taking of evidence on petitioner's entitlement to damages. *Papadopoulos v. Bd. of Higher Education,* 14 OrApp 130, 178, 511 P2d 854 (1973) *See Appendix E, infra*, p. 89. Petitioner had been declared entitled to damages because as a public employe of the Board of Higher Education, he had been discharged in a manner that violated his right to a pre-discharge hearing. *Papadopoulos,supra* at p.177.

It also appeared of record that the proceeding on remand was pending.

Far from giving full faith and credit to that proceeding, the district court entered a judgment which is in serious conflict with Oregon law and the usage of the Oregon courts in the application of the rule of *res judicata*. Oregon statutes, ORS 43.140 to 43.160,43.110 and 43.220, set the background to the application of that rule. *See Appendix G* , pp. 96-97.

Of the *res judicata* rule the Oregon Supreme Court has stated:

> " The law is well established that a final judgment rendered by a court of competent jurisdiction, on the merits, is conclusive as to the rights of the parties and their privies, and as to them constitutes an absolute bar to a subsequent action involving the same claim, demand and cause of action. * * * To give such effect, there must not only be identity of subject matter, but also of cause of action, * * *.

> " But if the subsequent proceeding be between the same parties, or their privies, and is based upon the same claim or cause of suit as that in the prior case, the judgment in the first suit is not only a bar as to all matters actually determined therein, but also as to every other matter which the parties might have litigated and had decided as incident to or essentially connected therewith, * * *. *Wagner v. Savage*, 195 Or 128, 244 P2d 161,169 (1952).

See also *Western Baptist Home Mission Bd. v. Griggs*, 248 Or 204, 433 P2d 252 (1967). That both *Wagner* and *Western Baptist* were overruled, and the definition of *res judicata* broadened in *Dean v. Exotic Veneers*, 271 Or 188, 531 P2d 266 (1975), serves to show the way in which the *res judicata* rule was intended to be applied to judicial orders and proceedings had before 1975. The tests adopted in *Dean* were expressly stated to be prospective in their application. *Waxwing Cedar Products v. Koennecke*, 278 Or 603,611, 564 P2d 1061 (1977).

It appeared on the face of the record before the district court that the parties to the State proceeding were not identical with the parties before the district court. But nothing was placed in the record to indicate that the respondents not named as parties to the prior State proceeding were, in all their capacities, privies of the Board of Higher Education, and therefore bound by the prior determinations. The question of privity was a genuine fact issue not resolved by the district court.

Cf. Jones v. Flannigan, 270 Or 121,526 P2d 543,545 (1974).

It is with the question of "finality" that there appears a serious conflict between the district court and Oregon's law and usage. The Oregon Supreme Court holds that:

> " * * * both the rule of "law of the case" and that of res judicata are applicable only to "an adjudication of issues which have culminated in a final decree", and "one embracing all issues", rather than to a ruling "upon a segment of the whole case." *RLK v. Tax Commission*, 249 Or 603, 608-609, 438 P2d 985,987 (1968)

Huszar v. Certified Realty, 272 Or 517, 538 P2d 57 (1975).

In this case, the district court had before it the following language:

> " * * * Therefore, upon remand the circuit court will explore and, if necessary, hear evidence upon the remedy issue. * * *."

Papadopoulos v. Bd. of Higher Ed., 14 Or App, 130, 178, 511 P2d 854 (1973). *See Appendix E,infra*, p.89. Had the circuit court reached precisely the same determination without the involvement of an appellate court, i.e. if it had determined the Board of Higher Education to be liable to petitioner because of his discharge in a manner violative of his right to a pretermination hearing, *Papadopoulos*, at p.177, *see Appendix E infra*, p. 88 , such determination of liability would not have been final

under Oregon's law and usage because the remedy issue remained for determination. In Oregon, "finality" for res judicata purposes is the same as "finality" for the purposes of appeal. *See ORS 43.110, Appendix G, infra,* p.96 . The Oregon court is consistent in its definition of "finality". See *Winters v. Grimes,* 124 Or 214, 264 P 359 (1928); *Coldwon v. McKenzie,* 260 Or 237, 490 P2d 971 (1971).

B. Whether the prior State proceeding has reached finality or not, and whether res judicata principles can be applied to that proceeding or not, it remains that the district court has departed from the accepted and usual course of judicial proceedings by its failure or refusal to exercise jurisdiction over certain issues.

The Congress having created the district courts has ordained that they exercise original jurisdiction in specific situations. The court of appeals below has recognised that when a district court is properly appealed to in a case over which it is granted jurisdiction by law, it may not refuse to exercise that jurisdiction. *Mach-Tronics v. Zirpoli,* 316 F2d 820,824 (CA 9.1963); *McClellan v. Carland,* 217 US 268 (1910); *Meredith v. City of Winter Haven,* 302 US 228 (1943).

Petitioner invoked the district court's jurisdiction under provision of 28 USC §§1331,1332 and 1343. *See supra* p.8 (R.68) He was enabled by federal statute to

allege his common law claims as well as his civil rights claims and his claims arising under the US Constitution subject only the the requirement that he allege a sufficient amount in controversy.

By his complaint, and during the course of the proceedings below, petition gave fair notice of his claims and the grounds on which they rest; he included his claims under the 1871 Civil Rights Act and under the Constitution of the United States with his claims of a continuing breach of a valid contract, and to continuing torts on the part of individual respondents. He alleged a lack of jurisdiction in the State court over the matters raised by his complaint before the district court, and he claimed damages for the violation of his right to a pretermination hearing as well as for other injuries. (R. 67-90)

The district court failed or refused to exercise jurisdiction over the following issues:

(a) <u>The issue of the jurisdiction enjoyed by the circuit court of Marion County</u>. Under Oregon law a void judgment can be attacked in any court otherwise possessed of jurisdiction. *Hughes v. Aetna Casualty Co.*,234 Or 426, 383 P2d 55 (1963). The district court clearly enjoyed concurrent jurisdiction with the circuit court over that question.

(b) <u>The issue of remedy placed before the circuit court on remand</u>. Until or unless that damages issue is determined in the State court, and

a final judgment entered in that proceeding on the assumption that jurisdiction exists, petitioner is free to place the identical issue before the district court, and that court may not refuse to exercise its authority. The fact of concurrent *in personam* jurisdiction over the identical claim is no bar. *Princess Lida v. Thomson*, 305 US 456,466 (1939)

(c) Claims which could not have been joined in the State proceeding. Petitioner initiated the proceeding in the State courts by the filing and service of a petition. By his "2nd Amended Petition" (R.136) petitioner invoked the State court's jurisdiction for review of an administrative decision pursuant to ORS 183.480. By that petition, the proceeding initiated may have been a special statutory proceeding or it may have been a suit. If the former, the court was limited to the exercise of the limited jurisdiction allotted to it under ORS 183.480 and 183.490, *see Appendix G*, pp. 93, and petitioner was precluded both from joining parties other than *agencies* as respondents therein, *see ORS 183.310(1)*, *Appendix G*, p.92 , and from having any issue heard except as permitted under ORS 183.480 and 183.490. If his petition met the definition of a *complaint* ,see ORS 16.210, *Appendix G*, *infra* p. 95 , and the proceeding was a suit, petitioner could not join a cause of suit for contract with any other cause of suit, and he also could not join in that suit parties and claims affecting less than all parties. *See ORS 16.230(2)*, *Appendix G*, *infra* p. 96 . Petitioner did not present the

contract issue by his petition to the State court. He could not be barred from presenting the contract issue in a second proceeding, *Mayer v. 1st National Bank*, 260 Or 119, 489 P2d 385 (1973). He presented his claim, timely, of his entitlement to a pre-discharge hearing in the form of a *contested case*; he waived no right thereby to bring a contract claim in a subsequent proceeding brought after his discharge from employment. The two remedies did not co-exist; under Oregon's law, petitioner was not required to elect between them. *McAllister v. 1st Mortgage Ins.*,279 Or 279, 547 P2d 539 (1977). The district court could not refuse to hear petitioner's contract claim; it had not been presented in the State court and it was not required to be presented.

(d) Claims expressly ommitted from prior determination. In any case the Oregon Court of Appeals was express in ommitting any possible contract claim from its determination. It had ruled that petioner's right to a pre-discharge hearing was the dispositive issue, *Papadopoulos v. Bd. of Higher Ed.*, 14 OrApp 130,135, 511 P2d 854 (1973), *see Appendix E*,*infra*, p. 40, and that an employment contract creating a right to continued employment beyond any such right created under statute or administrative regulation could not, standing alone, create a right to a pre-discharge hearing. *Papadopoulos*, *at* p.168, *Appendix E at* p.78 . The existence of a valid contract of employment was irrelevant to the determination of the issue declared to be dispositive of the prior State case. Under

(R.81); the district court could not refuse to exercise its jurisdiction over that claim.

(e) Claims which had not accrued at the time of prior litigation. Petitioner asserted the existence of a conspiracy or conspiracies; while he alleged facts sufficient to state a cause of action under the 1871 Civil Rights Act, he also alleged the less restrictive facts stating a cause of action based on common law conspiracy. (R.74-89) He alleged a course of action on the part of respondents, that it was wrongful, that it was continuing, that it had damaged him and would continue to damage him in the future. He alleged the existence of past actions by the respondents to his damage, and he claimed the possible existence of future acts and of future potential for injury to him. This Court's reasoning in *Lawlor v. Nat.Screen Service*, 349 US 322,328(1954); *Zenith Radio v. Haseltine*, 401 US 321, 91 SCt 795, 806 (1971) was stated in reference to alleged conspiracy to violate federal ant-trust laws. In so far as that reasoning refers to the inapplicability of *res judicata* principles to causes of action which had not accrued at the time of previous litigation, those decisions apply here. The district court could not refuse to exercise jurisdiction over causes which had not accrued during the prior stages of petitioner's State litigation.

at 328. Any other result would confer a partial immunity from civil liability on the respondents, a result not consistent with the purpose of the *res judicata* rule. Nor could the district court refuse to exercise jurisdiction over any damages claim for which the cause of action accrued only after the date of prior judgment even though such damages might result from a wrongful course of action initiated long ago. *Cf. Zenith* at 339; *Poster Exchange v Nat. Screen Service Corp.*, 456 F2d 662,666-7 (CA 5, 1972) Such damages accrue the moment they can be proved with the requisit certainty. The district court could not refuse to exercise jurisdiction over causes of action which had not accrued during prior stages of petitioner's State litigation.

Having failed or refused to hear petitioner on his multiple claims which could not and should not have been barred under proper application of Oregon's *res judicata* law, the district court's January 5, 1976, judgment will have the effect of barring petitioner from reasserting all claims mentioned in his complaint which accrued before that date.

In 1970 petitioner was threatened with discharge from his employment. He initiated his State litigation with a valid claim of entitlement to a pre-discharge hearing; he asserted none of his common law rights of action at that time. The district court court, and with it the court of appeals, has acted to foreclose petitioner from exercising his right to vindicate his right to a valid, pre-existing contract,

and in a manner foreclosed by the Fifth Amendment's Due Process Clause, *supra*,p.7, *Hovey v. Elliot*,17 SCt 841,844, 167 US 409 (1897).

Professor Moore states that the due process clause of the Fifth Amendment acts as a check on federal power to extend the effect of *res judicata* beyond a certain point. 1B *J.Moore,Fedral Practice*,¶0.406(2), 905 at n.10,906 at n.11. That certain point has been exceeded in this case to the point of extinguishing petitioner's claims which petitioner could not have raised in an unfinished and, as alleged by petitioner, a partially invalid State proceeding. It goes without further argument that *res judicata* is inapplicable, hence that summary judgment and the consequent judgment were invalidly granted in favor of the respondents, and invalidly affirmed by the court of appeals.

The court of appeals having sanctioned the decision of the district court to extend the application of *res judicata* beyond the accepted point, to fail to give full faith and credit to Oregon proceedings, and to fail to exercise its jurisdiction as ordained by the Congress, this Court's powers of supervision are hereby invoked by petitioner.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael Papadopoulos Ph.D.
Acting pro se
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Corvallis, OR 97330
(503)-753-3138

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL PAPADOPOULOS,Ph.D., Plaintiff-Appellant, vs. OREGON STATE UNIVERSITY,et al., Defendants-Appellees.) No. 76-2146) MEMORANDUM

(August 18, 1977)

Appeal from the United States District Court for the District of Oregon

Before:WRIGHT and KILKENNY,Circuit Judges, and HARRIS,Senior District Judge.

Papadopoulos claims a denial of due process in the University's decision not to retain him as a professor of mathematics at the expiration of his three-year contract. He also alleges that non-retention was not based on his academic performance but rather was retaliation for his exercise of free speech. The district court granted summary judgment for the defendants, holding that the action was barred by subject preclusion. We agree.

The Oregon Courts and administrative bodies already have adjudicated the rights of the parties. The Court of Appeals upheld the Board of Higher Education's affirmance of the University's decision

not to grant tenure and its finding of no civil rights violation.

The Court of Appeals, however, also held that Papadopoulos had not received a timely notice of termination and remanded the case to the Marion County Circuit Court for proceedings to assess damages. Papadopoulos v. Bd.of Higher Ed. 14 OrApp 130, 511 P2d 854 (1973). The Oregon Supreme Court denied review and the United States Supreme Court denied a writ of certiorari. 417 US 919 (1974).

It is clear that Papadopoulos has had a full opportunity to litigate his grievance. He is entitled to no more. Scoggin v. Schrunk, 522 F2d 436,437 (9th Cir. 1975),cert.denied, 423 US 1066 (1976).

AFFIRMED

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL PAPADOPOULOS, Ph.D., Plaintiff-Appellant,	)	No. 76-2146
vs.	)	
OREGON STATE UNIVERSITY,et al., Defendants-Appellees.	)	ORDER

Before: WRIGHT and KILKENNY, Circuit Judges, and HARRIS,Senior District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Wright voted to reject the en banc suggestion.

The full court has been advised of the suggestion for a rehearing en banc, and no judge of the court has requested a vote on it. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DATED: September 29, 1977.

ENTERED on September 29, 1977.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MICHAEL PAPADOPOULOS, Plaintiff, vs. OREGON STATE UNIVERSITY; OREGON STATE BOARD OF HIGHER EDUCATION; RAY T.YASUI, JANE CARPENTER, GEORGE H.COREY, ROBERT D.HOLMES, ELIZABETH H.JOHNSON, PHILIP A.JOSS, GEORGE H. LAYMAN, VALERIE McINTYRE, W.PHILIP McLAURIN, MARC F.MADEN, JOHN D. MOSSER, ANCIL H. PAYNE, LOUIS B. PERRY, JOHN W. SNIDER, LORAN L. STEWART and E.G. WESTERDAHL II, *in their individual capacities and in their capacities as members or as ex-members of the Oregon State Board of Higher Education;* ROY E.LIEUALLEN, *in his individual capacity and in his official capacity as Chancellor of the Oregon State Board of Higher Education;* ROBERT W.MACVICAR, *in his individual capacity and in his official capacity as President of Oregon State University;* ROY A. YOUNG and JAMES H.JENSEN, *in their individual capacities and in their capacities as ex-presidents of Oregon State University;* and DAVID B. NICODEMUS, *in his individual capacity and in his official capacity as Dean of Faculty of Oregon State University,* Defendants.	)	No. 75-497 OPINION

Michael Papadopoulos, *pro se*, 5370 NW Lawrence Ave., Corvallis, OR 97330.

Lee Johnson, Attorney General of Oregon, John Leahy, Assistant Attorney General, 100 State Office Building, Salem OR 97310. Tim D.Norwood, Asst. Attorney General, 555 State Office Building, Portland, Oregon 97201, *attorneys for defendants.*

SKOPIL, Judge:

INTRODUCTION

The plaintiff, Michael Papadopoulos, claims that the failure of the defendants, Oregon State University, Oregon State Board of Higher Education, certain members and ex-members of the Oregon State Board of Higher Education, Roy E.Lieuallen, Robert W.MacVicar, Roy A.Young, James H.Jensen, and David B. Nicodemus, to review (sic) his teaching contract or to grant him tenure denied him certain constitutional rights.

Plaintiff claims that the defendants Nicodemus, Jensen, Young, MacVicar, Lieuallen, Corey, Holmes, Johnson, Joss, Layman, Mosser, Snider, Stewart, Westerdahl and others conspired to deny plaintiff equal protection of the laws or equal privileges and immunities under the laws. He contends that these defendants discriminated against him because of his membership and participation in pacifist activities, the anti-war movement, and movements opposing racial inequality.

As to the other defendants, plaintiff contends that their actions deprived him of his rights of due process, equal priviledges and immunities, and that their action was in retaliation for plaintiff's exercise of his right to freedom of speech.

A motion to dismiss or,in the alternative, for summary judgment was filed on behalf of all defendants. It alleges that the action is barred by the applicable statute of limitations, that the defendants are not persons subject to suit under the Civil Rights Act, that the defendants are immune from suit pursuant to the 11th Amendment, and that the plaintiff is barred by res judicata - collateral estoppel.

Jurisdiction is based on 28 USC §§ 1331, 1332(2) (*sic*), and 1343.

FACTS

The plaintiff had been employed as a math professor at Oregon State University. His contract expired in March (*sic*) of 1970. In early 1970 he was informed that when his contract expired,he would not be granted tenure at Oregon State University. He appealed that decision to the Board of Higher Education.In his appeal he asserted that Oregon State failed to employ proper procedures in its action against him. The Board's Academic Affairs Committee heard the appeal. The committee concluded that proper procedures had been followed. The Board of Higher Education adopted the committee's findings.

PRIOR COURT ACTION

The plaintiff sought review of the proceedings in the state circuit court. The state court found that the Board of Higher Education was subject to the Oregon Administrative Procedure Act, ORS Ch.183. The court decreed that the Board's inquiry should not be limited to purely procedural matters. The Board was directed to conduct a hearing on plaintiff's termination. In compliance with the court's order, the Board made the following findings and conclusion:

"1) That the procedure followed by the Oregon State University administration concerning the non-renewal of the appointment of Dr. Papadopoulos and concerning the denial of tenure to him complied with procedural due process in all respects.

"2) That there was substantial evidence to justify the finding by the administration at Oregon State University that Dr. Papadopoulos did not comply with the standards of Oregon State University School of Science for production of scholarly research.

"3) That the administration at Oregon State University did not base its decision to deny Dr. Papadopoulos indefinite tenure and a renewal of his academic appointment on any conduct protected by the constitution and laws of the United States of America and the State of Oregon.

"and conclusion

"That the decisions of Oregon State University not to grant indefinite tenure to Dr. Papadopoulos and not to renew his academic appointment are affirmed."

Plaintiff challenged the decision (Oregon Administrative Procedure Act, ORS Ch. 183) He claimed:

"(a) That the decision not to renew petitioner's contract was either arbitrary or made for the purpose of retaliating against petitioner for the exercise of his constitutionally protected rights of free speech as stated in paragraph II of this Second Amended Petition for Judicial Review.

"(b) That the Board failed and refused to review the criteria employed by Acting President Young in making his decision against renewal of petitioner's contract.

"(c) That the Board failed to act impartially.

"(d) That the Board failed to exercise discretion judiciously.

"(e) That petitioner was denied a hearing on the reasons for non-renewal of his contract.

"(f) That the Board did not comply with the procedural requirements of Chapter 183 of Oregon Revised Statutes,as specified in paragraph VII of this Second Amended Petition for Judicial Review.

"(g) That petitioner was not given timely notice of termination of his employment." Defendants' Exhibit No.5.

The Board's decision was affirmed. Circuit Judge Val D.Sloper concluded:

"1. There was no denial of due process concerning the non-renewal of the appointment of the Plaintiff, and denial of tenure to him, and

"2. The action of Oregon State University in refusing to renew the Plaintiff's contract and denying him tenure was based on his academic record, and not on constitutionally permissible conduct." Defendants' Exhibit No. 1.

Plaintiff then appealed to the Oregon Court of Appeals. It affirmed except on the issue of notice to the plaintiff prior to his termination. The Court of Appeals remanded the case to determine to what damages plaintiff was entitled because of improper notice of termination. Thereafter plaintiff filed a petition for rehearing before the Oregon Court of Appeals, a petition for review by the Oregon Supreme Court, and a petition for certiorari to the United States Supreme Court, all of which were denied.

CONCLUSION

Plaintiff now seeks to relitigate his case in the federal court. He reasserts issues already determined or issues he should have raised in his administrative

or judicial hearings. This he cannot do. *Angel v. Bullington*, 330 US 183 (1947); *Scoggin v. Schrunk*, 522 F2d 436 (9th Cir. 1975); *Hutcherson v. Lehtin*, 485 F2d 567 (9th Cir. 1973); *Francisco Enterprises v. Kirby*, 482 F2d 481 (9th Cir. 1973) All cases must have an ending. Plaintiff has already had his day in court. Res judicata - collateral estoppel is applicable. I need not consider the other issues raised

Defendants' motion for summary judgment is granted.

Dated this 30th day of December, 1975.

/s/ Otto K.Skopil
United States District
Judge.

Entered on January 5, 1976.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MICHAEL PAPADOPOULOS, *Plaintiff*,	)	Civil No. 75-497
vs.	)	
OREGON STATE UNIVERSITY, *et al.*, *Defendants*.	)	SUMMARY JUDGMENT

Based on the opinion granting defendants' motion for summary judgment,

IT IS ORDERED AND ADJUDGED that the action is dismissed.

Dated: January 5, 1976.

/s/ Robert M. Christ
Clerk of Court

Entered on January 5, 1976.

APPENDIX E

No. 1747—June 27, 1973

IN THE COURT OF APPEALS OF THE STATE OF OREGON

(14 OrApp 130, 511 P2d 854)

PAPADOPOULOS, *Appellant-Cross-Respondent, v.* OREGON STATE BOARD OF HIGHER EDUCATION, *Respondent-Cross-Appellant.*

Appeal from Circuit Court, Marion County.

VAL D. SLOPER, Judge.

Submited on record and briefs March 5, 1973.

Michael Papadopoulos, Corvallis, pro se, for appellant-cross-respondent.

Lee Johnson, Attorney General, John W. Osburn, Solicitor General, and Al J. Laue, Assistant Attorney General, Salem, for respondent-cross-appellant.

Herbert W. Titus, Cooperating Attorney, Eugene, American Civil Liberties Union of Oregon, Inc., amicus curiae.

Hans A. Linde, Eugene, Interinstitutional Faculty Senate, Oregon State System of Higher Education, amicus curiae.

Donald W. Brodie, Cooperating Attorney, Eugene, and Stephen R. Goldstein, Philadelphia, Pennsylvania, for American Association of University Professors, amicus curiae.

Before SCHWAB, Chief Judge, and FOLEY and FORT, Judges.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

SCHWAB, C. J.

Petitioner was employed as a Professor of Mathematics at Oregon State University from September

1967 to June 1970. In 1969 the respondent State Board of Higher Education or its subordinate officials at Oregon State decided to deny petitioner tenure and to terminate his employment. By way of this judicial review proceeding pursuant to the Administrative Procedures Act, ORS ch 183, petitioner challenges those decisions. The circuit court upheld the Board and both petitioner and the Board appeal.

Literally dozens of issues have been briefed at length by petitioner and three amici supporting his position. The issues all relate to the substantive and procedural statutory and constitutional rights of public employes. For example, petitioner contends he was discharged because he engaged in First Amendment-protected activity or, alternatively, that his discharge was arbitrary; that he was entitled to a pretermination hearing on the reasons for his discharge; that the hearing he was accorded by the Board by order of the circuit court did not comply with the Administrative Procedures Act; and that the Board's discharge decision is not supported by substantial evidence. The Board, by its cross-appeal, contends the circuit court erred in ordering that petitioner be accorded a hearing on the reasons for his discharge. In our view the dispositive issue is whether petitioner was entitled to a hearing before being discharged effective June 1970.[1]

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[1] Schlichting v. Bergstrom, 97 Adv Sh 717, — Or App —, — P2d — (1973) involves related issues.

I

This record reveals, at the least, confusion on the part of the State Board of Higher Education and its subordinate officials at Oregon State University. To document this observation, we set out the facts in detail.

One source of confusion is the Board's regulations. *See*, Parts II and IV, infra. These regulations provide that academic personnel, like petitioner, are employed with "yearly tenure" or "indefinite tenure." For the three years petitioner taught at Oregon State, he had only yearly tenure.

Petitioner assumed his duties as a Professor of Mathematics in the Department of Mathematics of the School of Science at Oregon State in the late summer of 1967. When he was offered this position by the Chairman of the Mathematics Department, before accepting it, petitioner inquired about the Oregon State tenure system. This was of some significance to petitioner, since another university had offered him a professorship with immediate tenure. The Chairman advised petitioner that under the Board's regulations it was not possible to be granted what those regulations term indefinite tenure when first hired. However, at the administrative hearing in this case several professors testified that they had been granted indefinite tenure at Oregon State when first hired.

In any event, coorrectly or incorrectly petitioner was informed it was not possible that he be granted indefinite tenure immeditately. The Chairman did at

least imply, and petitioner was led to believe, that the granting of indefinite tenure would be little more than a formality in his case.

Relying in part on these representations, and in part on the intent of the Mathematics Department to expand its programs in applied mathematics—petitioner's area of specialization—petitioner turned down other job prospects and accepted the offer from Oregon State. In fact, during the conversations that culminated in his employment at Oregon State, it was agreed that petitioner would devote a substantial amount of time to building the Department's applied mathematics curriculum. All indications are that petitioner diligently and effectively did so.

In December of 1968, after petitioner had been at Oregon State about 1½ years, the Mathematics Department began processing a recommendation that petitioner be granted indefinite tenure. A four-member departmental committee unanimously recommended indefinite tenure for petitioner. The tenured faculty of the Department voted 20-1 in favor of indefinite tenure for petitioner. The Chairmarn of the Department added his own personal favorable recommendation.

The material generated in the Mathematics Department passed up the chain of command to John Ward, Dean of the School of Science. There had been previous instances in which Dean Ward displayed some displeasure toward petitioner. Between 1967-68, petitioner's first year at Oregon State, and 1968-69 most faculty members in the Mathematics Department

received at least cost-of-living salary raises; through Dean Ward's efforts, petitioner did not receive any salary increase. Also, witnesses at the administrative hearing attributed to Dean Ward some highly defamatory statements about petitioner.[2]

Dean Ward consulted with his informal six-member Advisory Committee on all recommendations for indefinite tenure. When petitioner's case was discussed, some question was raised about petitioner's progress on a monograph he was writing. Dean Ward then asked the Chairman of the Mathematics Department for an answer to this question. The Chairman responded by letter:

> "* * * Professor Papadopoulos is working on a research monograph on the topic of the theory of distributions as it pertains to the study of hyperbolic partial differential equations with particular applications to diffraction problems. I know enough of this topic to recognize that this would fill a significant gap in research literature. I have heard Professor Papadopoulos deliver a one-hour colloquium on some aspects of these questions; my impression from his sketch was that he had some very interesting contributions completed and also there remained much work to be done before he could achieve the degree of completeness demanded by a monograph. He estimates that he has about ⅓ of a completed first draft and, of course, notes and sketches of later parts."

Dean Ward did not tell his Advisory Committee of this letter; instead, purporting to be passing on an oral

[2] Dean Ward, who has left Oregon, did not testify at the administrative hearing. Nor did he respond to interrogatories sent him by both petitioner and the Board.

report, Dean Ward told the Committee there was no evidence that petitioner was making significant progress on his monograph. Also, Dean Ward told the Committee he had informally asked unidentified deans at other unspecified universities whether they would hire petitioner, and their answers were all in the negative. Not surprisingly, based on the information Dean Ward had furnished them, the Advisory Committee unanimously voted against recommending indefinite tenure for petitioner. The Committee was not asked to express any view on retention or non-retention of petitioner on an annual basis, and did not do so.

On February 25, 1969, Dean Ward then sent a letter to petitioner that stated:

> "As you have been aware, the Department of Mathematics, and especially the faculty of the Department, have undergone intensive evaluation and review by an outside evaluation committee and internal committees. After many hours of discussion and evaluation of the recommendations of all groups concerned, I have had to make several decisions concerning recommendations for indefinite tenure for non-tenured faculty members as well as informing faculty members not necessarily considered for tenure that they will not be reappointed to their positions * * *.
>
> "* * * In your particular situation, you will not be recommended by this office to the Dean of Faculty for reappointment to the faculty of the Department of Mathemaicts after the academic year 1969-70."

In so far as it discloses a reason for his decision, Dean Ward's letter implies that petitioner's contributions

to the Department of Mathematics were believed to be inadequate by various evaluation committees. The only evaluation reports to which Dean Ward could have been referring are in the record before us. There is nothing in those reports that is any way critical of petitioner.

After receiving Dean Ward's letter, petitioner protested to the Faculty Senate Committee on Review and Appeals that he was being dealt with unfairly. That Committee considered petitioner's case along with two others. The Committee reported:

"* * * * *

"In the opinion of the members of the Review and Appeals Committee, faulty judgment was evident on the part of the previous chairman of the Department of Mathematics when he implied, during appointment negotiations with the appellants, that the granting of indefinite tenure was a routine matter and would occur in the natural course of events even though based upon 'mutual satisfaction.' * * * [S]tatements made to prospective appointees probably should have spelled out more carefully the process by which indefinite tenure was granted and the ultimate responsibility for such decisions.

"Nevertheless, inquiries made by the Committee of the appellants and others disclosed that, while tenure matters were discussed (either orally or in writing), representations of the routine nature of indefinite tenure recommendations were such as to lead the appellants to believe that definite tenure would be granted as a matter of course. * * * Such implied commitment on the

part of the department chairman apparently was not unique but, rather, appeared to be the prevailing practice at the time of the appointment of, or negotiation with, the three appellants.

"By the same token, questionable procedures were followed by the Dean of Science in reversing the recommendations of the Department of Mathematics, especially in the instances of Drs. * * * and Papadopoulos whose recommendations carried nearly unanimous approval, solely on professional grounds, by the tenured members of the Department.

"The 1966 Statement on Government of Colleges and Universities jointly formulated by the American Association of University Professors, the American Council on Education, and the Association of Governing Boards of Universities and Colleges, states in part V. The academic institution: the faculty—

" 'Faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, not to reappoint, promotions, the granting of tenure, and dismissal. The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy. Furthermore, scholars in a particular field or activity have the chief competence for judging the work of their colleagues; in such competence it is implicit that responsibility exists for both adverse and favorable judgment. Likewise there is the more general competence of experienced faculty personnel committees having a broader charge. Determinations in these

matters should first be by faculty action through established procedures, reviewed by the chief academic officers with the concurrence of the board. The governing board and the president should, on questions of faculty status as in other matters where the faculty has primary responsibility, concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail.'

"In light of the foregoing statement and assuming that the dean of a school falls within the class of a chief academic officer, statements received from members of the Mathematics Department indicate that reasons for failure by the Dean of Science to concur with the departmental recommendation were not clear other than that the department of mathematics at certain unidentified universities would not appoint these persons as full professors to their staffs.

"In addition to the failure of the Dean of Science to state in detail compelling reasons for failure to concur woith the judgments of the departmental faculty, it is the opinion of the Committee that evaluations based upon whether or not a department at another university, (even if such were specified) would appoint an individual at a given rank is at best a questionable practice. Such practice becomes more suspect when one does not know the questions asked or the information presented in requesting such an evaluation. In addition, the question arises as to whether the same or similar standards necessarily apply for the determination of eligibility for indefinite tenure as those which might be employed in evaluat-

ing an individual for initial appointment. Again, the validity of the procedure followed is at best controversial.

"It further appears (but not verified) that the procedure of requesting an evaluation by the chairman of department of another university in terms of qualification for appointment to that university's staff was followed only in the three cases in question and was not a routine step in the evaluative process carried out by the Dean of Science's office. While it may be agreed that the evaluation of the three cases in question might present special problems because of the academic rank involved, the unusualness of the procedure and the significance placed upon such conclusions drawn therefrom raises the question as to whether such represents a significant departure from accepted practice.

"While it can be taken as a responsibility of the dean of a school, within the context of the above statement of primary faculty responsibities, to attempt to insure excellence of departmental faculties, it would also follow that in doing so due regard must be given to the judgments of departmental faculties. In view of the care and thoroughness which appear to have been exercised by the faculty of the Department of Mathematics in making their evaluations of staff members being recommended for tenure and that such recommendations represent the opinions of a substantial majority of the departmental tenured faculty, it would appear that failure by the Dean of Science to concur with such recommendations would necessarily have to be supported by compelling reasons stated in detail to the tenured depart-

mental faculty. In the instances in question, such detailing of reasons for failure to concur was not apparent to those members of the Mathematics Department interviewed in the course of the Committee's investigations.

"The Review and Appeals Committee concludes and recommends to the President:

> "That Indefinite Tenure be granted to Dr. Michael Papadopoulos on the basis of:
> "1. The near unanimous and positive recommendation of the tenured members of the Mathematics Department, based solely on the professional competency of Dr. Papadopoulos and the failure on the part of the Dean of Science to state compelling reasons for lack of concurrence with the departmental recommendation.
> "2. Prior commitment."

After receiving the above report and recommendations, the President of Oregon State, by letter dated September 24, 1969, advised petitioner he had reached a contrary decision. This letter stated in part:

> "With some regret we must advise you that we do not support the recommendation of the Review and Appeals Committee that you be granted indefinite tenure as a Professor of Mathematics at Oregon State University. The principal reasons for our decision are summarized below:
>
> "1. To the best of our knowledge and understanding, the action of the School of Science in not recommending the granting of tenure and in recommending your non-reappointment after the academic year

> 1969-70 does not involve prejudice or other violations of your academic freedom. A request to review the possibility of violations of academic freedom was implicit in our charge to the Committee. The Committee's report and supplementary letter support our belief that no violation of academic freedom occurred and that no personal prejudice or discrimination was involved on the part of any individual or group who participated in the decision.
>
> "2. We believe that the action of the School of Science, by imposing additional standards and professional judgments in its review of your department's recommendation, was consistent with sound academic policy and involved significant and responsible faculty participation in the decision making process. In conducting its reviews, the School attempted to apply proper and uniform criteria to all recommendations in an effort to insure fairness and to develop and maintain high academic standards in all disciplines. Moreover, it is our belief that the Dean's final decision had the strong support of his faculty Advisory Committee * * *.[3]
>
> "3. Based on our review of both the departmental and school recommendations and also on our own attempt to evaluate your professional record, the executive office

[3] The President's letter did not comment on the criticism of the Review and Appeals Committee to the effect that Dean Ward presented to his Advisory Committee inappropriate information on which to formulate its recommendation.

> finds no sound academic basis for reversing the recommendation of the School of Science. Dean Ward has reported the reason for his decision to us, namely, the judgment that your professional record failed to demonstrate the degree of scholarly performance expected of a full professor in the School of Science. We consider this reason to be a proper basis for the dean's decision."

The President's letter concluded:

> "* * * [W]e regard Dean Ward's letter of February 25, 1969, to you as a letter of timely notice of non-reappointment in accordance with the provisions of Section L-3-F of the Administrative Code of the Oregon State Department of Higher Education."

Most prior attention had focused on whether petitioner would be granted indefinite tenure. Under the relevant regulations, *see* Part II, infra, it would have been possible for petitioner to have been denied indefinite tenure, yet to remain at Oregon State on annual appointments for up to six years, perhaps being reconsidered for indefinite tenure at some future date. The record does not contain any clear explanation of why, in petitioner's case, the decision to deny indefinite tenure was coupled with a decision to also terminate his employment.

The President's reference to "the degree of scholarly performance expected of a full professor" was the first public reference to petitioner's termination being based on not having published a "sufficient"

number of research papers. While it is clear this was a factor in the deliberations of Dean Ward's Advisory Committee, for some reason it had not been mentioned at all in the report of the Faculty Senate Review and Appeals Committee as being a stated reason for petitioner's termination.

Upon learning of the President's decision expressed in his letter of September 24, the Faculty Senate voted to conduct another, more detailed, investigation. The Faculty Senate created an Ad Hoc Committee consisting of three professors from outside of Oregon.

After spending two days at Oregon State in January of 1970, the Ad Hoc Committee reported:

> "* * * Both * * * and Papadopoulos were, in the opinion of the two mathematician members of this committee, well above the average in the department and comparable with the most competent members. Hence they cannot be considered bad appointments * * *.
>
> "That these appointments should have been offered and accepted without tenure requires separate discussion for this was apparently connected with earlier university practice. Although opinion was not unanimous on this point, it seems to have been common before 1966 for tenure to be regarded as a certainty if one were more or less pulling his own weight in a department. * * * [B]oth * * * and Papadopoulos were apparently assured verbally that tenure was nothing to worry about even though the letter of appointment contained a caveat * * *.

"In 1966 with the advent of a new Dean of Science, Dean Ward, there was a sudden change in the attitude toward tenure and its granting, and this leads us into another aspect of the difficulty.

"When Dean Ward assumed his office in the fall of 1966, he apparently decided that one of his most important duties was to improve and upgrade the research quality of the various departments in the School of Science, and to increase also the quantity of research. This is, of course, a laudable goal and the time was possibly appropriate for taking some definite steps in this direction * * *.

"An important step [taken by Dean Ward] was the initiation of Departmental Review Committees consisting of distinguished men from outside the university who were charged with examining the department in question and making recommendations for its future development. One of the first such committees was appointed for the Mathematics Department. The three members (none of whom, by the way, were on a list of suggested persons given to the Dean by the Chairman) are outstanding mathematicians, spanning among them a large part of mathematics, and are also men of good will. Unfortunately, their report was treated as a confidential report to the Dean and only portions of it shown to the Department members or to this committee. Those portions shown to us as a special privilege did not strike us as being unsuitable for general distribution. The parts not shown us contained among other things a rating of the department members on a scale of approximately 1 to 5—excellent, very good, good, fair, poor * * *.

"The Dean's treatment of this document as confidential has had an unfortunate effect. Perhaps unintentionally, it has been used as a weapon. Since no one *knows* where he stands, it is easy to imply that he is far down on the list and doesn't really deserve consideration in some matter or other. Whether such abuse is exaggerated or frequent is not the point. The situation should never arise and all future Visiting Committees should make their evaluations in terms which can be available to all. We think this can be done without precluding quality judgments.

"Another step taken by Dean Ward to improve quality was to apply more severe criteria for promotion and tenure. The somewhat easy-going attitude toward tenure which prevailed before 1966 was suddenly reversed and each tenure appointment was carefully scrutinized both by the dean and by his Advisory Committee. One can hardly find fault with taking such appointments seriously, but the suddenness of the change of policy certainly is a factor in the present case * * *.

"Against this background we now consider in more detail the appointments of * * * and Papadopoulos. As has already been pointed out, they, together with four other such appointees, came to OSU knowing that they did not in fact have tenure but believing that this was an administrative detail which would be taken care of in the near future, barring some gross neglect of duty or other malfeasance * * *.

"[When petitioner wast considered for tenure] [a]s is customary in such matters, the chairman solicited letters from authorities outside the university who were likely to be familiar with the

work of * * * and Papadopoulos. The outside consultants were well chosen and with one exception wrote strong letters of support for promotion to tenure. The one exception was somewhat lukewarm, but was clearly not based upon knowledge of the man's published papers, but instead upon general impressions. The proposed promotions to tenure were supported unanimously in the case of one of the men and with only one dissenting vote for the other by the tenured members of the department.

"Why, then, were they refused by Dean Ward? Two reasons were offered: (a) lack of recent research activity ('lack of performance'), and (b) further consultation with mathematicians outside the university * * *.

"Before making this decision Dean Ward visited the chairmen of three other mathematics departments. He refused to identify them except to say that they did not include M.I.T. or Berkeley, a statement we interpret metaphorically to mean that the universities visited were appropriate ones for comparison with OSU. The question put to the department chairmen was, 'Would you hire either of these men in your department? It is the opinion of the Ad Hoc Committee that this question, if indeed it was asked, is inappropriate and that, furthermore, there is considerable impropriety in the whole procedure. First of all, because it is secret and purely verbal, there is no written record to which one can turn for verifiable details as to the opinions of these department chairmen. Secondly, a department chairman is not competent to judge the quality of mathematical research except in his own field. It would be by the merest chance that his opinion, if he were willing to give one, would be as valuable as those of the authorities already consulted. One of the chairmen consulted is accidentally known to us; his field of specialization is different from that of either of the men under consideration * * *.

"The other criterion was lack of research activity * * *.

"* * * [Petitioner's] publication record from 1954 to 1963 is outstanding. Following that period, there seems to be a gap until 1968 when two invited papers weer given at a Symposium at Indiana University. One of these is appearing in the printed proceedings. We have seen the page proof and it appears to be a substantial paper. A criticism heard during our conversations at OSU that this was not a paper in a refereed journal seems misdirected and, furthermore at misreading of Papadopoulos's character. Whatever his faults, there is no evidence to indicate that he would be willing to publish pot-boilers. However, this still leaves a puzzling gap of five years.[4] This was partly explained in conversations with Papadopoulos. At the beginning of this period he developed a new method of treating a certain class of problems and decided that, instead of publishing it in a series of papers showing its application to different fields, he would write a monograph devel-

[4] The Board, in arguing there is substantial evidence to support the decision to terminate petitioner's employment, relies heavily on this reference to a "puzzling gap of five years" in petitioner's record of publications. However, we note that at least three of these five years were before petitioner came to Oregon State, and that at the administrative hearing the Board stipulated that petitioner was well qualified when hired.

oping the method first and then the applications in succeeding chapters. There is no question but that he is writing the monograph. Various experts in the field referred to it in their supporting letters. One had a 105-page first draft of a portion of it, we saw it, and some of the material has been expounded in lectures at various places. Perhaps the real question is why has it taken so long to finish it. There seem to be several reasons, principally a sticky point in the development which has held him up, and, since coming to OSU, time spent in developing new courses. Although the period of not much visible activity may appear overlong for one who was so active in research earlier, it is not clear that he has either run out of steam or lost interest. If forced to judge whether his work will progress in a stable job environment or whether his drive to continue creative work has been largely lost for good, a difficult question of judgment, our committee would find itself split in its feelings, one saying the drive is inadequate for further productive work, and two saying it is adequate * * *."

The Ad Hoc Committee's report was submitted to the Faculty Senate. That body then adopted a resolution phrased in terms of the Ad Hoc Committee's ultimate conclusion:

> "In our opinion the department [of Mathematics] will be in the best position for continued development of strength if the University accepts its moral commitment to award tenure in the cases of M. Papadopoulos and * * *.",

and requested the President of Oregon State to reconsider his prior decision to the contrary.

By letter dated February 19, 1970, the President advised petitioner:

> "This office has given careful reconsideration to your tenure case in the light of the Faculty Senate's action of February 12, 1970, and of the ad hoc committee's report of February 3, 1970. We must advise you that our decision of September 24, 1969 has not been altered. This decision is based on our judgment, that the ad hoc committee's report concerning the adequacy of performance constitutes additional reasonable doubt that tenure should be granted."

The President's letter did not elaborate on why he believed a 2-to-1 vote that petitioner was likely to continue to produce good research and publications created "reasonable doubt that tenure should be granted."

Petitioner then appealed to the Board. In March of 1970 the Board's Academic Affairs Committee held a hearing on petitioner's appeal. The Committee limited its inquiry to questions of whether proper procedures had been followed at Oregon State in petitioner's case. In spite of the explicit statutory authority for the Board to make personnel decisions, ORS 351.070(1)(a),[5] the consensus among the Board

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[5] "(1) The State Board of Higher Education may, for each institution under its control:

"(a) Appoint and employ a president and the requisite number of professors, teachers and employes, and prescribe their compensation and tenure of office or employment." ORS 351.070(1)(a).

members present was that the substantive questions of whether petitioner should be granted tenure or terminated were beyond their competence. As the Committee's report of that meeting states:

> "* * * Mr. Layman expressed the view that as a matter of principle the board would be in a difficult position if it undertook to judge matters of substance relating to an individual's competence in an academic field and to substitute its judgment for that of the the president—assuming their views differed.
>
> "Chancellor Lieuallen pointed out the hazards of asking the board to rule on matters of substance in which the president had acted. If the board were to sustain a faculty member's appeal and reverse the president's decision, what would keep the board tomorrow from making the decision to insist upon the employment or the granting of tenure to someone acceptable to the board but who might be unacceptable to the president or to faculty groups."

The Committee concluded that proper procedures were followed in petitioner's case. It so reported to the Board, which then adopted these conclusions.

Petitioner then initiated this judicial review proceeding in circuit court. The Board initially contended it was wholly exempt from the Administrative Procedures Act. The circuit court ruled to the contrary—a ruling the Board's cross-appeal does not assign as error. Petitioner then called the circuit court's attention to: (1) some omissions and possible errors in the transcript of the hearing before the Board's Academic

Affairs Committee; and (2) the fact that the Committee had limited its inquiry to purely procedural matters. Petitioner contended these were grounds for remanding the case to the Board for the production of additional evidence. The circuit court agreed and entered the following order on February 11, 1971:

> "Application having been made by petitioner for leave to present additional evidence, and it having been shown to the satisfaction of the Court that respondent agency is subject to the Oregon Administrative Procedures Act, that the additional evidence is material and that there were good and substantial reasons for failure to present it in the proceeding before the agency, it is hereby ordered that additional evidence be taken by respondent agency under the conditions imposed in ORS 183.420, 183.440, 183.450 and 183.480(5)."

By this order the circuit court, in effect, ruled that the Board had to accord petitioner a hearing on the grounds for the termination of his employment.

In compliance with the circuit court's order, petitioner was granted a four-day hearing. The hearing officer prepared detailed proposed findings of fact and conclusions of law, all generally adverse to petitioner's position. After considering the administrative record, the Board adopted its own more limited findings

> "1) That the procedure followed by the Oregon State University administration concerning the non-renewal of the appointment of Dr. Papadopoulos and concerning the denial of

tenure to him complied with procedural due process in all respects.

"2) That there was substantial evidence to justify the finding by the administration at Oregon State University that Dr. Papadopoulos did not comply with the standards of Oregon State University School of Science for production of scholarly research.

"3) That the administration at Oregon State University did not base its decisionto deny Dr. Papadopoulos indefinite tenure and a renewal of his academic appointment on any conduct protected by the constitution and laws of the United States of America and the State of Oregon.",

and conclusion

"That the decisions of Oregon State University not to grant indefinite tenure to Dr. Papadopoulos and not to renew his academic appointment are affirmed."

II

Whether petitioner was entitled to a pretermination hearing on the reasons for his discharge depends upon a combination of Oregon statutes and United States Supreme Court cases interpreting the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We first consider some of the relevant statutes. In Part III, infra, we consider some of the relevant statutes. In Part III, infra, we consider the constitutional authorities.

One relevant statute is the Administrative Pro-

cedures Act, ORS ch 183. However, there is a question as to which of two different versions of the Administrative Procedures Act is applicable to this case. Some "old" parts of the Administrative Procedures Act were repealed effective September 9, 1971 and, at the same time, some "new" parts of the Administrative Procedures Act went into effect. This case was pending in circuit court on September 9, 1971. Does the "old" or the "new" version of the Administrative Procedures Act apply?

In *Russell et al v. Pac. Maritime et al*, 9 Or App 402, 406, 496 P2d 252, Sup Ct *review denied* (1972), we held that:

"* * * [T]he pre-September 9, 1971 procedures, including circuit court jurisdiction, apply to all cases of this type that were validly pending in circuit court on that date."

While the specific question in *Russell* was one of jurisdiction, we believe that holding to be applicable here.

The chronology in this case was as follows. The original petition for judicial review was filed May 7, 1970. After a demurrer was granted an amended petition was filed. After a motion to strike was granted in part, a second amended petition was filed on August 7, 1970. Following additional proceedings, this case was remanded to the Board on February 11, 1971. In compliance with the circuit court's remand order, a contested case hearing was held June 16, 17, 18 and 29, 1971. Based on the hearing record, the

Board made its final decision on September 7, 1971. By letter dated September 14, 1971, the administrative record was transmitted to the circuit court and filed therein September 16, 1971. The circuit court proceeded to decide the merits, upholding the Board's September 7, 1971 decision.

Thus it is apparent that all critical events in this case occurred before the September 9, 1971 effective date of the "new" Administrative Procedures Act. The original petition for judicial review was filed 16 months before that date. The order that the Board accord petitioner a contested case hearing was made seven months before that date. The hearing was concluded two months before that date. And the Board's final decision was made two days before that date. During all of this time "old" Administrative Procedures Act was in effect. It is the law by which those events should be judged.

The only events that occurred after September 9, 1971, were: (1) the filing of the Board's final decision with the circuit court; and (2) the circuit court's decision on the merits. The latter does not make the "new" Administrative Procedures Act applicable. A circuit court's decision is always going to be rendered after September 9, 1971, in cases like *Russell et al v. Pac. Maritime et al*, supra.

The various briefs all simply assert that because the Board's final decision was filed in a circuit court after September 9, 1971, therefore the "new" Administrative Procedures Act is applicable. We disagree.

Review of the Board's final decision was not in any way a new proceeding arising after September 9, 1971. It was the culmination of a single case that had been pending for 16 months on that date. The circuit court had not lost jurisdiction when it remanded this case to the Board. This was the same lawsuit both before and after the remand. There is no basis for the assertion that the "new" Administrative Procedures Act applies.[6]

The "old" Administrative Procedures Act used the term "contested case" to describe those situations in which an agency was required to grant a hearing before making a decision. The "old" Administrative Procedures Act described the basic procedures that had to be followed at a contested case hearing, such as reasonable notice, right to counsel, right to present evidence and right to cross-examine adverse witnesses. *See*, ORS 183.420 to 183.460 (1969). Contested case was defined as:

> "* * * [A] proceeding before an agency in which the individual legal rights, duties or privileges of specific parties are required by statute or constitution to be determined only after an agency hearing at which such specific parties are entitled to appear and be heard * * *." ORS 183.310(2) (1969).

Thus, in general, the "old" Administrative Proced-

[6] In view of our conclusion that the "old" Administrative Procedures Act governs, we express no view on the question of whether the terms of the "new" Administrative Procedures Act would produce a different result in this case—a question briefed at length by the parties.

ures Act did not *per se* identify those situations in which a contested case hearing was required, but, instead, required examination of other statutes and constitutional authorities to determine when a contested case hearing was mandatory before an agency made a final decision.

There are, of course, numerous statutes governing various aspects of public employment. One of the universal characteristics of these various statutory schemes is the distinction between probationary and tenured public employees. Specifically, any individual public employee is generally in one of three groups: (1) those with permanent job security, i.e., tenured; (2) those with no job security, i.e., probationary; and (3) those with some, but not permanent job security. In general, the distinction is that, by statute, tenured public employees can only be discharged "for cause" established in a hearing, while probationary public employes can be discharged for any reason or no reason and have no right to a hearing on the grounds therefor.

Many examples are available to illustrate the contrasts between these different groups. State employes are either "classified," "unclassified," or "exempt."[7] ORS 240.195 to 240.210. All unclassified and exempt employes are in the second group, i.e., there are no statutory limits on the prerogative of the state to discharge such employees. At the beginning of their

[7] The differences between "unclassified" and "exempt" state employes are not of any importance for present purposes—both groups are similarly situated in so far as their job security.

employment, classified employes "serve a trial period of not to exceed six months." ORS 240.405(1). During this initial probationary period classified employes enjoy no significant statutory job security. *See*, ORS 240.410. After completing this probationary period, the employe becomes a "regular employe" within the meaning of ORS 240.560(1), and thereafter can only be discharged "for cause," ORS 240.560(4), defined as "misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance or other unfitness to render effective service," ORS 240.555(1). Also, a regular classified employe must be granted a hearing on whether the statutory grounds exist for his discharge. *See*, ORS 340.560; *Phillips v. State Bd. of Higher Ed.*, 7 Or App 588, 490 P2d 1005 (1971), Sup Ct *review denied* (1972). In other words, a regular classified employe of the state enjoys permanent job security; by statute he can only be discharged for certain enumerated grounds and in accordance with certain established procedures.

A similar pattern exists for public employes in local governmental units. ORS ch 241 creates civil service requirements with which counties having a population of 300,000 or more must comply. ORS 241.020. When first hired by such a county, an employe "shall be on probation for a period * * * not to exceed one year if the position is in the police department of the office of the sheriff, otherwise not to exceed six months." ORS 241.265. After completing the required probationary period, the employe's "appointment shall be deemed permanent." ORS 241.275.

Thereafter, a permanent employe can only be dismissed "for cause," ORS 241.425, 241.430, pursuant to statutory hearing procedures, ORS 241.435 to 241.445. Counties with a smaller population than 300,000 may but are not required to adopt such civil service rules and procedures. ORS 241.006. Thus, permanent employes in larger counties are part of that group of public employes which enjoys permanent job security. Probationary employes in larger counties and all employes in smaller counties which have not chosen to adopt a civil service system are part of that group of public employes which enjoys no job security. *See,* ORS 204.601(2); *Schlichting v. Bergstrom,* 97 Adv Sh 717, 13 Or App 562, 511 P2d 846 (1973)

In school districts having a population of 100,000 or more, custodians, after serving a six-month probationary period, ORS 242.580, achieve permanent job security, ORS 242.590. Firemen, after serving a 12-month probationary period, ORS 242.766(1), achieve permanent job security, ORS 242.768(1), and thereafter can only be discharged "for cause," ORS 242.-796, 242.798; *see, Myers/Sherwood v. Tualatin RFD,* 5 Or App 142,, 483 P2d 95 (1971).

This general pattern obtains in the case of public elementary and secondary school teachers, albeit with a bit more detail and complexity. ORS ch 342. There is no provision for teacher job security in the smallest school districts, those having an average daily pupil attendance of less than 800. Teachers in intermediate-sized districts with average daily attendance of more

than 800, but less than 4,500, have those rights and duties enumerated in ORS 342.508 to 342.553. They are initially hired on a series of three one-year contracts. *See,* ORS 342.508; *George v. School Dist. No. 8R,* 7 Or App 183, 490 P2d 1009 (1971). Thereafter, if rehired, they must be given three-year contracts. ORS 342.508. During the term of one-year or three-year contracts, a teacher can only be discharged for the reasons specified in ORS 342. 530. But at the end of any contract period "the school board could decline to renew the contract for any reason." *George v. School Dist. No. 8R,* supra, 7 Or App at 195. Thus, teachers in such an intermediate-sized school district are an example of the group of public employes who have some, but not permanent job security.

Teachers in the largest school districts, those with average daily attendance of more than 4,500, are treated similarly to state employes. ORS 342.805 to 342.955. In such a school district a teacher serves a probationary period of three years, ORS 342.815(5), presumably with a series of one-year contracts, *see,* ORS 342.505, *cf.,* ORS 342.835(1). It is not completely clear what the extent of a teacher's job security is during the term of his contracts while in his probationary period. *Compare,* ORS 342.835(1) *with* ORS 342.530. It is clear that at the end of the term of the contracts during the probationary period a teacher has no job security.

> "The district board may, for any cause it may deem in good faith sufficient, refuse to renew the contract of any probationary teacher." ORS 342.-835(2).

If rehired after three years, a teacher achieves permanent job security. ORS 342.845. Thereafter, he can only be discharged for the grounds stated in ORS 342.865 and in accordance with the procedures stated in ORS 342.895 to 342.960.

As this survey of some of the statutory provisions governing public employment makes apparent, a feature common to all of the statutory schemes is that a new public employe serves an initial probationary period followed, in most cases, by the possibility of acquiring permanent job security. The probationary period, obviously, is designed to permit on-the-job observation and evaluation of the new employe's performance so that only those of demonstrated competence will acquire permanent job security. *See, Cammarata v. Essex County Park Comm'n*, 26 NJ 404, 412, 140 A2d 397 (1958):

> "It is difficult to evaluate the character, industry, personality, and responsibility of an applicant from his performance on a written examination or through cursory personal interviews. Knowledge and intelligence do not alone [suffice] * * *. The crucial test of his fitness is how he fares on the job from day to day when suddenly confronted by situations demanding a breadth of resources and diplomacy. Many intangible qualities must be taken into account, and, since the lack of them may not constitute good cause for dismissal under a tenure statute, the [employer] * * * is entitled to a period of preliminary scrutiny, during which the protection of tenure does not apply, in order that it may take pragmatically informed and unrestricted decisions as to an applicant's suitability."

Because of this valuable role that probationary public employment can serve, statutory schemes that distinguish between tenured and probationary employes have been uniformly upheld against challenges based on the Equal Protection Clause of the Fourteenth Amendment. *Schlicting v. Bergstrom*, supra, and cases cited therein.

There are no detailed statutes governing the employment of academic personnel by the State Board of Higher Education. Instead, the legislature has granted the Board general authority in this matter:

> "The State Board of Higher Education may, for each institution under its contral:
>
> "(a) Appoint and employ a president and the requisite number of professors, teachers and employes, and prescribe their compensation and tenure of office or employment.
>
> "* * * * *
>
> "(2) The State Board of Higher Education may, for each institution, division and department under its control:
>
> "* * * * *
>
> "(b) Enact rules and bylaws for the government thereof, including the faculty, teachers, students and employes therein." ORS 351.070(1)(a), (2)(b).[8]

Pursuant to this authority, the Board has adopted regulations covering employment matters. They conform to the general scheme discussed above.

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[8] State ex rel Kleinsorge et al v. Reid, 221 Or 558, 352 P2d 466 (1960), discusses the statutes governing the operations of the Board at length.

The Board's academic employes have either "yearly tenure" or "indefinite tenure." Although there are no definitions of these terms in the regulations, it is apparent that indefinite tenure means an academic employe cannot be discharged except for cause. Also it is apparent that yearly tenure means that an employe can only be discharged for cause during the term of his one-year appointment, but can be discharged, i.e., not rehired, for any reason at the end of each year.

The regulations seem to contemplate that an academic employe will usually initially be hired with yearly tenure. Then at some point within the next six years a decision will be made as to whether he will be granted indefinite tenure.

This sketch of the Board's employment practices is distilled from the following regulations that were in effect at the times material to this case.[9]

> "* * * All * * * [academic] employees * * * shall receive each year formal notification of conditions and terms of employment for the fiscal year beginning July 1. Such notification is sent out from the president's office. Unless otherwise specifically stipulated in individual notices, or

[9] All citations to the Board's regulations are to the provisions in effect at the time material to this case, all of which have since been replaced by new regulations. We cite the older regulations material to this case as "1969 Adm. Code."

We have previously treated the Board's 1969 Am. Code as having the force of law. West v. Bowers, 95 Adv Sh 1575, — Or App —, 502 P2d 270(1972), Sup Ct *Review denied* (1973); Vandever v. State Bd. of Higher Ed., 8 Or App 50, 491 P2d 1193 (1971), Sup Ct *review denied* (1972). We continue to do so in this case.

otherwise provided herein, appointments or reappointments are for a period not beyond the fiscal year designated in the notice of appointment. The official form is approved by the chancellor's office * * *." 1969 Adm. Code, sec L-3-A (4.

"Full-time members of the academic staff appointed with the rank of assistant professor or above shall be employed on a one-year basis, and ordinarily are considered for indefinite tenure effective with the fourth year of service. It is recognized that at times it may be desirable to grant indefinite tenure, before the end of three years to persons appointed with the rank of associate or full professor. An annual review shall be made by the president of those persons eligible for promotion beyond the rank of assistant professor.

"If any appointment of an academic staff member * * * not on indefinite tenure, is to be terminated otherwise than for cause, he shall be given a timely notice of termination as follows: during the first annual appointment, at least three months' notice; thereafter, at least twelve-months' notice * * *. Annual appointment for a seventh consecutive year shall normally include the granting of indefinite tenure unless the seventh annual notice of appointment specifically provides otherwise.

"The provisions of this section shall apply to all appointments unless in individual cases there is a definite written understanding to the contrary, in which case the exception will be noted in the notice of appointment." 1969 Adm. Code, sec L-3-F.

"* * * The appointment of an academic staff member with indefinite tenure will not be terminated for reasons other than for cause, except for financial exigency * * *." Adm. Code, sec L-3-FF (2) (b).

"* * * [Termination of employment—not for cause—staff members without indefinite tenure]. Appropriate notice of termination shall be provided staff members without indefinite tenure as set forth in Section L-3-F of the Administrative Code * * *." 1969 Adm. Code, sec L-3-FF(2) (c).

"* * * The appointment of an academic staff member, whether or not having tenure, may be terminated for cause as herein provided. 'Cause' shall be understood to include gross inefficiency, conviction of a felony, or conduct flagrantly unbecoming a faculty member." 1969 Adm. Code, sec L-3-FF(3) (a).

The regulations do not specifically define any standards governing an initial appointment ot a faculty, or governing decisions whether to reappoint or not to reappoint a faculty member with yearly tenure, or governing whether to grant or deny indefinite tenure. *But cf.*, 1969 Adm. Code sec C-2:

> "While not unmindful of other objects of state-supported institutions of higher learning, namely research and extension, or other service to the state, imparting instruction on the respective campuses is the primary and fundamental function of the institutions."

III

The above-discussed statutes are important in determining whether a public employe has a constitutional right, under the Due Process Clause, to a predischarge hearing. Specifically, tenured public employes do have a right to a hearing, but probationary public employes do not. *Board of Regents* v. *Roth*, 408 US 564, 92 S Ct 2701, 33 L Ed 2d 548 (1972); *Perry* v. *Sindermann*, 408 US 593, 92 S Ct 2694, 33 L Ed 2d 570 (1972); *see also*, *Slochower* v. *Board of Education*, 350 US 551, 76 S Ct 637, 100 L Ed 692 (1956).

The *Roth* case involved a nontenured assistant professor in his first year of his first job teaching in the Wisconsin public higher education system. In accordance with the relevant Wisconsin statutes and regulations he was given timely notification that his contract would not be renewed for a second year. He then initiated an action in federal court contending he was entitled to a statement of reasons for his nonretention and a pretermination hearing to contest those reasons.

The Supreme Court held to the contrary. "The requirements of procedural due process apply only to the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property. * * *" 408 US at 569. The Supreme Court concluded that a public employer's decision not to retain a probationary employe did not ordinarily constitute a deprivation of liberty. "* * * It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but

remains as free as before to seek another. * * *'" 408 US at 575. Also, the Supreme Court concluded that a public employer's decision not to retain a probationary employe did not ordinarily constitute a deprivation of property.

> "* * * To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. * * *
>
> "* * * * *
>
> "* * * [T]he terms of the respondent's appointment secured absolutely no interest in reemployment for the next year. They supported absolutely no possible claim of entitlement to reemployment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a

> *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment." 408 US at 577-78.

The *Sindermann* case also involved a college professor. He had been employed on a series of one-year contracts in the Texas public higher education system for 10 years. During his tenth year of teaching he was given timely notice that his contract would not again be renewed. Like Professor Roth, Professor Sindermann then went to federal court urging he was entitled to a statement of reasons for his nonretention and a pretermination hearing to contest those reasons.

His complaint alleged that while the public junior college where he had been employed had no formal tenure system, it "had a de facto tenure program." 408 US at 600. He alleged this program was based on a provision "in the college's official Faculty Guide" and on "* * * *guidelines promulgated by the Coordinating Board of the Texas College and University System that provided that a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure.* * * *'" (Emphasis supplied.) 408 US at 600.

The Supreme Court held that if Professor Sindermann could prove these allegations he would thereby establish that he "* * * had no less a 'property' interest in continued employment than a formally tenured teacher * * *." 408 US at 601, and "* * * such proof

would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his non-retention and challenge their sufficiency." 408 US at 603.

As previously noted, numerous statutes and regulations entitle certain public employes to permanent job security, i.e., they can only be discharged for enumerated causes. For employes who have achieved tenured status, these statutes create property interests within the meaning of the Fourteenth Amendment. Such employes cannot be deprived of this property interest without first having a hearing that satisfies due process requirements. *Perry v. Sindermann*, supra.

Also as previously noted public employes when first hired commonly are required to serve a probationary period. This can vary in length from up to six months for state classified employes to up to six years for professors employed by the State Board of Higher Education. Other public employes are in positions for which no provision has been made for ever acquiring permanent job security. *See, Schlichting v. Bergstrom*, 13 OrApp 562, 511 P2d 846 (1973). Employes who are in probationary status, either temporarily or permanently, have no property interest within the meaning of the Fourteenth Amendment. The constitution does not require that they be granted a pretermination hearing or be informed of

the reasons for their discharge.[10] *Board of Regents* v. *Roth*, supra.

Thus in Oregon, public employe tenure rights arise solely from statutes,or in the case of the Board,regulations adopted pursuant to a statutory delegation of authority. *See* Part II, supra. It is these tenure rights based on statute or regulation that create property interests that cannot be withdrawn qithout a due process hearing. Employment contracts of public employes may create rights to continued employment over and above that created by statute or regulation. But such an employment contract, standing alone, does not create the kind of interest that triggers the requirement of a due process hearing before the government withdraws the benefits of the contract, i.e., breaches it. In such a situation, the public employe's remedies are measured by the law of contracts, not by constitutional law.

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[10] By statute the legislature could extend any additional procedural rights it wished to probationary employes. Much of the argument before us relates to whether the legislature intended to do just that by way of the 1971 amendments to the Administrative Procedures Act, a question we do not reach. *See*, n 5, supra. Or the Board could, by regulation, expand the procedural rights of its probationary employes; Toney v. Reagan, 467 F2d 953 (9th Cir 1972), *cert denied sub nom* Mabey et al v. Reagan et al., 409 US 1130 (1973). discusses the details of regulations whereby nontenured faculty members were granted a right to a hearing if their appointments wer not renewed. Due process always speaks in terms of the minimum necessary procedures, whereas the legislature or the Board may well be concerned with the best possible procedures.

Also, several recent cases have involved hearing rights based on collective bargaining agreements. E.g., Curbelo v. Macomb College Trustees, 38 Mich App 432, 196 NW2d 843 (1972).

IV

With these principles in mind, we turn to the question of whether petitioner was entitled to a contested case hearing before the Board terminated his employment effective June of 1970. This depends upon whether the Board was "required by statute or constitution" to hold a hearing before deciding to terminate petitioner's employment. ORS 183.310(2) (1969).

The Board was not required by statute to hold such a hearing. As discussed in Part II, supra, under the state civil service laws unclassified employes have no statutory right to a hearing on the grounds for their dismissal. Unclassified employes include all academic employes of the Board. ORS 240.207(1)(b)(E).

Whether the Board was required by constitution to accord petitioner a pretermination hearing depends upon the existence and extent of petitioner's entitlement to future employment under the Board's regulaions. *See*, Part III, supra. When initially hired for the 1967-68 academic year, petitioner had a one-year appointment, i.e., what the Board's regulations term "yearly tenure." When reappointed for the 1968-69 and 1969-70 academic years petitioner also had yearly tenure. By the provisions of the relevant regulations, *see* Part II, supra, these appointments created property interests in the sense that petitioner could not have been discharged during any of those academic

years without the Board's first holding a hearing on the reasons for his discharge. But also under the Board's regulations petitioner could have been discharged at the end of any of those years for any reason or no reason, and he would have no right to a hearing on the grounds for his discharge."

But that is not the end of our inquiry. One of the Board's regulations in effect at the times material to this case provided:

> "If any appointment of an academic staff member * * * not on indefinite tenure, is to be terminated otherwise than for cause, he shall be given a timely notice of termination as follows: * * * at least twelve-months' notice * * *." 1969 Adm. Code, sec L-3-F

The effect of this regulation is to entitle the Board's academic employes to continued employment unless

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" It may seem anomalous that a professor on yearly tenure has no right to a hearing if dismissed at the end of his sixth year of teaching at Oregon State, while many courts have held that a college student cannot be expelled at any point without a hearing. *See*, Dixon v. Alabama State Board of Education, 294 F2d 150 (5th Cir.), *cert denied* 368 US 930 (1961); *see generally*, Wright, *The Constitution and the Campus*, 22 Vand L Rev 1027 (1969); Annotation, 53 ALR2d 903, 905 (1958). It may seem anomalous that a professor employed by the Board, unless and until granted indefinite tenure, enjoys less job security than the maintenance employe in the University of Oregon power plant involved in Beistel v. Pub. Emp. Relations Bd., 6 Or App 115, 486 P2d 1305 (1971). It may seem anomalous that under the Board's regulations a university professor can have less job security than do virtually all teachers in this state's public primary and secondary schools under ORS ch 342.

To the extent that these anomalies, if that they be, are the product of statutes and regulations, the legislature or the Board, respectively, are the appropriate forums in which to question the wisdom of such results.

and until they receive timely notice of termination in accordance with the requirements of the regulation. *See, Zimmerman* v. *Minot State College*, 198 NW2d 108 (ND 1972); *Pima College* v. *Sinclair*, 17 Ariz App 213, 496 P2d 639 (1972).

The Board's regulations are thus different from the comparable Wisconsin regulations involved in the *Roth* case. In Wisconsin public universities:

> "'* * * The employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made.' * * *" 408 US at 566, n 1.
>
> "'* * * February first is established throughout the State University system as the deadline for written notification of non-tenured faculty concerning *retention or non-retention* for the ensuing year. The President of each University shall give such notice each year on or before this date.'" 408 US at 567-68, n 4 (Emphasis supplied.)

Under these rules requiring formal notification of "retention or non-retention' it would appear that silence would be tantamount to nonretention. By contrast, under the Oregon State Board's rules, silence, i.e., failure to give twelve months' notiifcation of nonretention, is tantamount to retention.

The Board's regulations are unclear as to whether the twelve months' notification requirement means twelve months before the beginning of the fiscal year, referred to in 1969 Adm. Code, sec L-3-A(4) as being July 1, or twelve months before the beginning of the

academic year, referred to in 1969 Adm. Code, sec L-3-B as being September 16, or twelve months before the effective date of the termination, i.e., the end of the academic year, referred to in 1969 Adm. Code, sec L-3-B as being June 15. The last possibility seems most plausible, that is, in order to terminate petitioner's employment effective June 1970, it would have been necessary to so notify him by June 1969. However, we need not resolve this ambiguity in the Board's regulations because under any possible construction of the required notification date petitioner did not receive timely notification of termination.

The Board argues that Dean Ward's letter of the relevant inquiry is whether petitioner received timely notice of termination in compliance with 1969 Adm. Code, sec L-3-F. It seems obvious that the notice of termination contemplated by 1969 Adm. Code, sec L-3-F is notice from somebody with authority to make the decision to terminate. We conclude that there is no authority to terminate a professor's employment below the University President level.

As previously noted, Part II, supra, the Board has explicit statutory authority to "employ * * * professors * * * and prescribe their * * * tenure of * * * employment." ORS 351.070(1)(a). Presumably, there February 25, 1969, to petitioner complied with the notice requirements of 1969 Adm. Code, sec L-3-F, i.e., that petitioner received 16 months' notice his employment would be terminated effective June 1970. Petitioner contends the first formal notification of termination he received was the Oregon State President's

letter of September 24, 1969, and that this notification was too late under 1969 Adm. Code, sec L-3-F to terminate his employment effective June 1970. We agree with petitioner.

As in *Wallis* v. *Crook County School Dist.*, 96 Adv Sh 1863, — Or App —, 509 P2d 44 (1973), the relevant inquiry is not whether petitioner had knowledge of the possibility that he would be discharged; rather, would be no problem with the Baord's delegating some or all of its authority over personnel decisions to subordinates. *Cf.*, *Beistel* v. *Pub. Emp. Relations Bd.*, 6 Or App 115, 486 P2d 1305 (1971). However, the Board's regulations are obscure as to whether there has, in fact, been such a delegation.

Following the tenor of ORS 351.070(1)(a), one part of the regulations seems to provide that the Board has all control over personnel decisions:

> "* * * Appointments to positions in the academic classification in the salary budget are made by the board upon the recommendation of the department head, the dean, the executive head of the institution, and the chancellor." 1969 Adm Code, sec L-3-A(1).

However, 1969 Adm. Code, sec F-2-A provided:

> "The chancellor shall have complete authority * * * over the selections, appointment, promotion, salaries, transfers, suspensions, and dismissals of all officers, members of the faculties, and other employes of the system and its component divisions, exercising his authority by making recommendations to the board, in which rests the sole power of decision. * * *"

This section appears to be internally inconsistent; it starts with the statement that the chancellor has "complete authority," but concludes by stating the Board has "the sole power of decision." Moreover, 1969 Adm. Code, sec G-1-B further muddies the waters by seeming to give each university president a measure of control over personnel decisions:

> "The president [of each university] shall * * * have the initiative in the selection of all officers, members of the faculties, and other employees of his institution, subject to the approval of the chancellor. He shall exercise this authority in case of subordinate positions by filling vacancies as they may occur upon approval of the chancellor * * * when the salary outlay is within the budget appropriations provided by the board for such positions, and in case of major positions by making recommendations of appointment through the chancellor to the board, in which rests the sole power of election and confirmation of appointment."

Several of the above-quoted regulations deal primarily or exclusively with initial hiring decisions. The Board's regulations depart from their usual cryptic-ness and deal with the subject of termination procedures at some length. Most of the detail relates to terminations for cause. After a hearing before an ad hoc seven-member faculty committee, the "institutional executive" (presumably meaning the president) makes a decision. 1969 Adm. Code, sec L-3-FF-3(i). If that decision is adverse to the teacher, he can appeal to the Board and

> "The State Board of Higher Education may conduct such hearings as it deems proper for its consideration of an appeal, or it may refer the appeal to a committee of Board members for consideration and recommendation. * * *" 1969 Adm. Code, sec L-3-FF-3 (j).

The regulations contain no parallel provisions applicable to terminations not for cause. Thus, there is no answer in the regulations to the question of who makes a decision to terminate, i.e., not to renew the contract of a professor on yearly tenure.

The record is more illuminating. The proceedings at the Mathematics Department level—the Committee vote that petitioner be granted indefinite tenure, the vote of the tenured faculty that petitioner be granted indefinite tenure, and the Chairman's personal endorsement—were all phrased as recommendations and passed up the chain of command as such, for a final decision to be made at a higher level. After "consulting" with his Advisory Committee, Dean Ward's letter of February 25 stated:

> "* * * [Y]ou will not be *recommended* by this office to the Dean of Faculty for reappointment to the faculty of the Department of Mathematics after the academic year 1969-70." (Emphasis supplied.)

This, too, was phrased as a recommendation to be passed up the chain of command for a final decision to be made at a higher level. The record describes the Dean of Faculty as the "chief academic personnel officer for" Oregon State, but does not tell us what

his contributions were to the decision to discharge petitioner.

Confusion arises when we reach the University President level. The President's September 24 letter to petitioner stated:

> "* * * [T]he executive office finds no sound academic basis for *reversing* the *recommendation* of the School of Science. * * *" (Emphasis supplied.)

The same letter contained references to "Dean Ward's decision." Also, at the March 1970 hearing before the Board's Academic Affairs Committee the University President said there had been a "delegation of responsibility" to Dean Ward, and that the real issue was whether he (the President) had been correct in not overturning Dean Ward's decision.

However, we find no basis for concluding Dean Ward or anybody else below the University President level had authority to make a final decision to terminate petitioner's employment. Significantly, the same analysis was in the Board's answer filed in the circuit court in this proceeding:

> "* * * [R]espondent admits that it was within the scope of Dean Ward's authority to make *recommendations* to Acting University President Young concerning petitioner's continued employment by University and it was within the scope of Acting University President Young's authority *to act* upon such recommendations unless such act should be disapproved by respondent * * *." (Emphasis supplied.)

Therefore, the statement in the President's September 24 letter that

> "* * * we regard Dean Ward's letter of February 25, 1969, to you as a letter of timely notice of non-reappointment in accordance with the provisions of Section L-3-F of the Administrative Code of the Oregon State Department of Higher Education.",

had no basis in law. It was impossible for Dean Ward's February 25 letter to be "timely notice of non-reappointment" because under the Board's regulations Dean Ward did not have authority to make such a decision. It was the President's September 24 letter that was the actual notice of termination.

However, the President's September 24 letter was not adequate notice to terminate petitioner's employment before the end of the 1970-71 academic year. When June 1969 passed without petitioner's having been told his employment would be terminated effective June 1970 by somebody with authority to make that statement, he then had an entitlement to continue employment, based on the Board's regulations, until June 1971. The President's September 24 letter was sufficient notice to terminate petitioner's employment in June 1971; that letter was not sufficient notice to terminate petitioner's employment sooner than June 1971.

Since the Board's regulations created an entitlement to continued employment until June 1971, the Board was required by the constitution to accord petitioner a hearing when it sought to discharge him before that date. *See*, Part III, supra. Since a hearing was required by the constitution, the Administrative Procedures Act, ORS ch 183, required that the hearing should be a contested case hearing conducted in accordance with the requirements of the Administrative Procedures Act. *See*, Part II, supra.

In spite of petitioner's entitlement to continued employment until June 1971, the Board discharged him effective June 1970. It did not accord petitioner a proper hearing before doing so. The hearing before a committee of the Board in March 1970 did not comply with the requirements of the Administrative Procedures Act. Just as one example, cross-examination was not permitted in violation of ORS 183.450(3) (1969).

In summary, the Board's June 1970 discharge of petitioner was in violation of his constitutional right to a hearing before being deprived of his property interest in continued employment until June 1971, and in violation of his statutory right under the Administrative Procedures Act that such a hearing be conducted in accordance with that statute.

There remains the question of an appropriate remedy, an issue on which the copious briefs before us are not very helpful. Normally, a public employe discharged in a manner that violates the employe's rights to a pretermination hearing would be entitled to reinstatement. *Greene* v. *Howard University*, 412, F2d 1128 (DC Cir 1969). But reinstatement would only be for the period of the employe's entitlement to con-

tinued employment under relevant statutes and regulations. Here petitioner's entitlement to continued employment ended in June 1971. Since that date has long since passed, reinstatement is not the appropriate remedy in this case.

Instead, ti appears that petitioner is entitled to money damages in the form of what his salary would have been for the 1970-71 academic year less the amounts he did earn or reasonably could have earned during that period. *Zimmerman* v. *Minot State College*, supra. This would be the natural result of application of the principle that the victim of an unconstitutional act is entitled to be restored to that which he lost. *Cf. Bivens v. Six Unknown Fed. Narcotics Agents*, 403 US 388, 91 S Ct 999, 29 L Ed 2d 619 (1971). However, as noted we have not had the benefit of full argument on the remedy issue, and there is no evidence in the record on petitioner's mitigation, i.e. what he did earn or reasonably could have earned during the 1970-71 academic year. Therefore, upon remand the circuit court will explore and, if necessary, hear evidence on the remedy issue. In the unusual circumstances of this case, we believe the circuit court has authority to do so under the terms of ORS 183.480(6) (1969).[12]

[12] ORS 183.480(6) (1969) provided:

"The review shall be conducted by the [circuit] court without a jury as a suit in equity and shall be confined to the record, except that, in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs."

In summary, we hold: (1) The notice of termination of employment petitioner received was too tardy, under the Board's regulations, to terminate petitioner's employment effective June 1970; (2) therefore, under the same regulations petitioner had an expectation of continued employment until June 1971; (3) petitioner's expectation of continued employment was a property interest within the meaning of the Due Process Clause—he could not be deprived of continued employment until June 1971 without a pretermination hearing; (4) such a hearing had to comply with the requirements of the Administrative Procedures Act, ORS ch 183; (5) petitioner was not accorded a pretermination hearing that complied with the Administrative Procedures Act. Thus, to the extent that the circuit court affirmed the petitioner's discharge effective June 1970, that determination is reversed and remanded for further proceedings on petitioner's damages for the 1970-71 year. In all other respects the circuit court's decision is affirmed.

Affirmed in part; reversed and remanded in part.

Once a court of equity acquires jurisdiction, it can award complete relief. Ruby v. West Coast Lumber Co., 139 Or 388, 10 P2d 358 (1932). Even if equitable relief is denied, money damages can be awarded. Fisk v. Leith, 137 Or 459, 299 P 1013, 3 P2d 535 (1931).

APPENDIX F

STATE OF OREGON

MICHAEL PAPADOPOULOS, Appellant, Cross-Respondent,	MANDATE
v.	Appeal from
OREGON STATE BOARD OF HIGHER EDUCATION, Respondent-Cross-Appellant.	MARION County
	No. 70049

This cause having come on to be heard on appeal and having been duly submitted and considered:

IT IS HEREBY ADJUDGED and ORDERED that the decision entered below in this cause is affirmed in part; reversed and remanded in part.

IT IS FURTHER ORDERED that appellant-cross-respondent recover from respondent-cross-appellant damages, costs and disbursements in this court in the amount of $417.80.

The cause is remanded for further proceedings to law and this Court's decision and opinion herein.

ENTERED at Salem, Oregon, this 27th day of JUNE, 1973.

APPENDIX G

PROVISIONS OF STATE LAW PERTINENT TO THE CASE

Chapter 183 of the Oregon Revised Statutes, 1969 Replacement Part, pp.93-99, contains the following pertinent provisions:

" ORS 183.310 * * *. As used in ORS 183.310 to 183.510:

(1) "Agency" means any state board, commission, * * *, or officer authorized by law * * * to adjudicate contested cases.

(2) "Contested case" means a proceeding before an agency in which the individual legal rights, duties or privileges of specific parties are required by statute or constitution to be determined only after an agency hearing at which such specific parties are entitled to appear and be heard * * *."

" 183.420. * * *. In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall state the time, place and issues involved, * * * and opportunity shall be afforded all parties to present evidence and argument with respect thereto. * * *."

" 183.470. * * *. Every decision and o order adverse to a party to the proceeding, rendered by an agency in a contested case * * * shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the determination of each contested issue of fact. * * *."

" 183.480. Judicial review of contested cases

(1)(a) * * *(A)ny party to an agency proceeding aggrieved by a final decision in a contested case * * * is entitled to judicial review thereof under ORS 183.310 to 183.510.

(1) (b) Judicial review of decisions in contested cases * * * shall be solely as provided in ORS 183.310 to 183.510.

(2) Jurisdiction for judicial review is conferred upon the Circuit Court for Marion County * * *. Proceedings for review shall be instituted by filing a petition in (that) court. * * *. The petition shall state the nature of the petitioner's interest, the facts showing how the petitioner is aggrieved by the agency decision, and the ground or grounds upon which the petitioner contends the decision should be reversed

and set aside. True copies of the petition shall be served by registered mail upon the agency and all other parties of record in the agency proceeding. No responsive pleading shall be required of the agency. * * *.

* * *.

(6) The review shall be conducted by the court without a jury as a suit in equity and shall be confined to the record, except that, in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

(7) The court may adopt the agency findings of fact and affirm the decision of the agency; or it may reverse and set aside the agency decision, or reverse and remand for further proceedings, * * *. The court shall thereupon enter its decree.

" 183.490. * * *. The court may, upon petition as described in ORS 183.480, compel an agency to act where it has unlawfully refused to act,or unreasonably delayed action.

Chapter 16 of Oregon Revised Statutes, 1969 replacement part contains, at pp. 121,122 the following pertinent provisions:

" 16.210 * * *. (1) The first pleading on the part of the plaintiff shall be the complaint.

(2) The complaint shall contain:

(a) The title of the cause * * * and the names of all the parties to the action * * *.

(b) A plain and concise statement of the facts constituting the cause of action * * *.

(c) A demand of the relief which the plaintiff claims. If the recovery of money or damages is demanded, the amount thereof shall be stated.

"16.220 Joinder of causes of action.

(1) The plaintiff may unite several causes of action in the same complaint when they all arise out of:

(a) Contract, express or implied.

(b) Injuries * * * to the person.

(c) Injuries * * * to property.

(d) Injuries to character.

* * *

(h) Injuries both to the person and property, when caused by the same wrongful act or ommission.

* * *

(2) The causes of action so united must all belong to one only of these classes (and must affect all the parties to the action, * * *."

" 16.230 Joinder of causes of suit

(1) The plaintiff in a suit may unite several causes of suit in the same complaint when they all arise out of:

(a) The same transaction,or transactions connected with the same subject of suit.

(b) Contract, express or implied.

(c) Injuries * * * to property.

* * *

(2) The causes of suit so united must all belong to one of those classes, (and) must affect all the parties to the suit, * * *.

Chapter 43 of Oregon Revised Statutes, 1975 replacement part, contains at pp.351 -352 the following pertinent provisions:

" 43.110 * * *. The effect of a judgment, decree or final order in an a action, suit or proceeding before a court of judge of this state or of the United States, having jurisdiction is as follows:

(1) * * *.

(2) * * * (T)he judgment, decree or order is, in respect to the matter directly determined, conclusive between the

parties, their representatives and their successors in interest by title subsequent to the commencement of the action, suit or proceeding, litigating for the same thing, under the same title and in the same capacity.

" 43.140 * * * A judicial order, other than a judgment, decree or final order, in an action, suit or proceeding before a court or judge of this state or of the United States creates a disputable presumption concerning the matter directly determined between the same parties, their representatives and their successors in interest by title subsequent to the commencement of the action, suit or proceeding, litigating for the same thing, under the same title and in the same capacity.

" 43.150 * * * The parties are the same when those between whom the evidence is offered were adverse in the former case, and a judgment, decree or other determination could have been made between them alone, though other parties were joined.

" 43.160 * * * That only is determined by a former judgment, decree or order which appears on its face to have been so determined or which was actually and necessarily included therein or necessary thereto.

In The
SUPREME COURT OF THE UNITED STATES

No. .....

MICHAEL PAPADOPOULOS Ph.D.,
Petitioner,

v.

OREGON STATE UNIVERSITY,et al.,
Respondents.

AFFIDAVIT OF SERVICE

County of Benton)
) ss.
STATE OF OREGON)

I, MICHAEL PAPADOPOULOS Ph.D., being first duly sworn, depose and say:

I am the petitioner herein, acting in my own behalf. I served three true copies of the foregoing Petition for a Writ of Certiorari by mailing them, postage prepaid, to JAMES A. REDDEN, Attorney General of the State of Oregon, 100 State Office Building, Salem, Oregon 97310, attorney for the respondents, on this ___ day of December,1977. I certify that all parties required to be served have been so served.

Michael Papadopoulos Ph.D.
5370 NW Lawrence Ave.
Corvallis, OR 97330.

Signed and sworn to before me this __ day of December, 1977.

_____
Notary Public for Oregon

My commission expires _____.